

Mr. Ed King  
Excise Tax Unit

Y  
January 7, 1988

David H. Levine  
Tax Counsel

Energy Resources Surcharge Law

This is in response to your memorandum dated December 7, 1987. You ask for our input regarding a letter Board Member William Bennett received from

The [redacted] has been filing Energy Surcharge Returns even though its completed forms show no surcharge owing. Apparently, all the [redacted]'s sales of energy are to PG&E for resale. In its letter to Mr. Bennett, the [redacted] asks if it must continue filing the returns considering:

- "1. Title II, Section 210, of Public Law 95-617, (92 Stat 3118), exempts third party power producers from many of the regulatory requirements typically required of 'utilities'.
- "2. The [redacted] appears to be the only non-governmental firm completing this form. Most of the reporting groups are irrigation districts.
- "3. Ten percent of the Kilowatt-hours produced in California are generated by third party power producers. To the best of my knowledge, only the [redacted] is reporting power production to the Equalization Board."

We believe that the [redacted] must continue to file returns. It is an "electric utility" as defined by Revenue and Taxation Code section 40010, without regard to whether it is subject to regulation or is regulated by the Public Utilities Commission, because it generates and sells electrical energy. Every electric utility is required to file a return, and there are no exceptions to this statutory requirement. (Rev. & Tax. Code § 40061.)

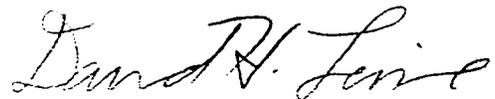
Mr. Ed King

-2-

The three points the Board asks us to consider do not alter this conclusion. Federal law exempting the Exchange from "many of the regulatory requirements" does not serve to exempt the Exchange from filing a return, since that requirement is not prohibited by federal law. Furthermore, that requirement is not an attempt to regulate its functioning as a utility. The Board's second point is irrelevant unless it is making the same point as in its third point, which is that the Board is not requiring all utilities to file the returns. Again, this does not serve to relieve the Exchange from its obligation to file a return. Of course, we should attempt to apply this requirement uniformly to all utilities.

The filing of returns by an electric utility that sells energy only to another electric utility does appear to be a useless exercise. Even if the purchasing utility consumes any of the purchased energy, the seller may collect the surcharge only if both utilities and the Board agree to such collection. (Rev. & Tax. Code §§ 40019, 40019.1.) Thus, utilities such as the Exchange will always file zero returns unless the Board has agreed otherwise. You may wish to instigate a technical amendment to the law to eliminate this filing requirement under such circumstances if you agree that it is futile.

DHL:ss



cc: Mr. Larry A. Augusta  
Mr. E. Leslie Sorensen, Jr.